

PT 03-29

Tax Type: Property Tax

Issue: Charitable Ownership/Use

STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS

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PAW'S CRITTER  
CROSSING, INC.  
APPLICANT

v.

No. 02-PT-0003  
(00-16-2674)  
P.I.N: 32-13-100-015

ILLINOIS DEPARTMENT  
OF REVENUE

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**RECOMMENDATION FOR DISPOSITION**

**APPEARANCES:** Mr. Steven A. Kandelman of Sarnoff & Baccash on behalf of Paws Critter Crossing, Inc. (the "applicant"); Mr. Michael Abramovic, Special Assistant Attorney General, on behalf of the Illinois Department of Revenue (the "Department")

**SYNOPSIS:** This proceeding raises the limited issue of whether real estate identified by Cook County Parcel Index Number 32-13-100-015 (the "subject property") was owned by an "institution of public charity," as required by 35 ILCS 200/15-65(a), during the 2000 assessment year. The underlying controversy arises as follows:

Applicant filed a Real Estate Tax Exemption Complaint with the Cook County Board of Review (the "Board") on December 28, 2000. Dept. Group Ex. No. 1. The Board reviewed applicant's complaint and recommended to the Department that the requested exemption be denied due to "insufficient documentation" in that applicant failed to submit the trust agreement under which it held title to the subject property. *Id.*

On December 20, 2001, the Department issued its initial determination in this matter, finding that the subject property is not in exempt ownership.

Applicant filed a timely appeal to the Department's initial determination and later presented evidence at an evidentiary hearing, at which the Department also appeared. Following submission of all evidence and a careful review of the record, I recommend that the Department's initial determination in this matter be affirmed.

**FINDINGS OF FACT:**

1. The Department's jurisdiction over this matter and its position therein are established by the admission of Dept. Group Ex. No. 1.
2. The Department's position in this matter is that the subject property is not in exempt ownership. *Id.*
3. Applicant is an Illinois not-for profit corporation that is also exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code. Applicant Ex. Nos. 2, 7.
4. Applicant's organizational purposes, as set forth in its Articles of Incorporation, are "to rescue and rehabilitate wildlife by providing a supportive habitat for injured animals and working to release them back to their natural environment." Applicant Ex. No. 2.
5. Applicant's Articles of Incorporation further provide, in relevant part, that the board of directors that governs its daily business affairs shall consist of Dwight L. Uhter, Sr. ("Mr. Uhter"), his wife, Darlene Uhter ("Mrs. Uhter"), their son, David Uhter, their foster son, Eugene Miller, and one other private individual. Applicant Ex. Nos. 1, 2.

6. Mr. and Mrs. Uhter owned the subject property prior to September 6, 1996.

Applicant Ex. No. 1, 12.

7. On September 6, 1996, Mr. and Mrs. Uhter executed a deed in trust that contained the following relevant terms:

THE GRANTORS, Dwight L. Uhter and Darlene Uhter, his wife, of the County of Cook and the State of Illinois, for and in consideration of Ten DOLLARS, and other good and valuable consideration in hand paid, Convey and QUIT CLAIM unto DWIGHT L. UHTER, SR. and DARLENE UHTER, husband and wife, in joint tenancy with right of survivorship, as Co-Trustees under the provisions of a trust agreement dated the 5<sup>th</sup> day of September, 1996,<sup>[1]</sup> ... the [subject property as it is described by its appropriate legal description].

Applicant Ex. No. 1. (Capitalization as it appears in the original).

8. The Joint Declaration of Trust that establishes the Uhter Trust provides, *inter alia*, that:

- A. Mr. and Mrs. Uhter have transferred “to ourselves as trustees,” the subject property and certain of their other assets<sup>2</sup> that form the *corpus* of the trust;
- B. “Upon the death of the survivor of us, the trustee shall forthwith distribute the trust estate in equal shares to my sons, Dwight L. Uhter and David L. Uhter, *per stirpes*. However, all maintenance equipment and tools are to remain on the premises and any of the beneficiaries using same must maintain said property or replace same if broken. When all real estate is sold or distributed, all of said tools and

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1. This trust shall hereinafter be referred to as the “Uhter Trust.”

2. The record does not disclose the exact nature of these assets.

equipment are to be sold or divided equally between the beneficiaries[;]” and,

- C. The trustee shall hold, manage, care for and protect the trust property in accordance with powers which include, but are not limited to power to lease trust property for any period of time through or commencing in the future or extending beyond the terms of the trust.

*Id.*

- 9. Mr. and Mrs. Uhter, “as Co-Trustees under Trust Agreement Dated 9/5/96,” leased the subject property to applicant pursuant to the terms of a lease dated November 1, 1996. Applicant Ex. No. 3.

- 10. This lease contained the following relevant terms and conditions:

- A. The lease shall run for a ten year term that commences November 1, 1996 and ends October 31, 2006;
- B. The applicant shall use the subject property for no purpose other than rescuing and rehabilitating wildlife in such a manner as to enable wildlife to return to its natural habitat;
- C. The applicant shall pay Mr. and Mrs. Uhter, as rental for the subject property, the sum of \$1.00, which was to be paid when the lease was executed on November 1, 1996;
- D. The applicant shall pay Mr. and Mrs. Uhter, as additional rent for the subject property, all real estate taxes or other assessments levied against the subject property, together with all water rates and water charges and other governmental levies and charges, that are imposed against the subject property;

- E. The applicant shall keep the premises in good repair throughout the term of the lease and yield up said premises to Mr. and Mrs. Uhter in good condition and repair at the end of the lease term;
- F. The applicant shall not sublet the premises or any part thereof without first obtaining written consent from Mr. and Mrs. Uhter;
- G. The applicant shall not assign or otherwise transfer the lease without first obtaining written consent from Mr. and Mrs. Uhter;
- H. Throughout the lease term, the applicant shall allow and not interfere with Mr. and Mrs. Uhter's free access to the premises, which Mr. and Mrs. Uhter shall enjoy for the purpose of examining or exhibiting the property or making any repairs that Mr. and Mrs. Uhter should deem necessary;
- I. Throughout the lease term, the applicant shall also allow, and not interfere with, Mr. and Mrs. Uhter's free access to the premises, which Mr. and Mrs. Uhter shall enjoy for purposes of allowing them to place "For Sale," "To Rent" and other similar notices on the property;
- J. If the applicant should default on any of the covenants and agreements contained in the lease, then Mr. and Mrs. Uhter, or their legal representatives, shall, at their election and without notice to the applicant, and also without prejudice to any other legal remedies that are available to them, declare the lease term ended and re-enter the premises for purposes of removing applicant therefrom; and,

K. Both Mr. and Mrs. Uhter as lessor, and applicant as lessee, specifically agree that the covenants and agreements contained in the lease “shall be binding upon, apply and inure to their respective heirs, executors, administrators and assigns.”

*Id.*

**CONCLUSIONS OF LAW:**

Article IX, Section 6 of the Illinois Constitution of 1970 provides as follows:

The General Assembly by law may exempt from taxation only the property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes.

Pursuant to Constitutional authority, the General Assembly enacted Section 15-65(a) of the Property Tax Code, wherein all property owned by “institutions of public charity” is exempted from real estate taxation, provided that such property is “actually and exclusively used for charitable purposes and not leased or otherwise used with a view to profit.” 35 ILCS 200/15-65(a); Methodist Old People's Home v. Korzen, 39 Ill.2d 149, 156, 157 (1968).

Property tax exemptions are inherently injurious to public funds because they impose lost revenue costs on taxing bodies and the overall tax base. In order to minimize the harmful effects of such lost revenue costs, and thereby preserve the Constitutional and statutory limitations that protect the tax base, statutes conferring property tax exemptions are to be strictly construed in favor of taxation. People Ex Rel. Nordland v. the Association of the Winnebago Home for the Aged, 40 Ill.2d 91 (1968); Gas Research Institute v. Department of Revenue, 154 Ill. App.3d 430 (1st Dist. 1987). Therefore, any and all doubts that arise in an exemption proceeding, whether they are attributable to

evidentiary deficiencies, debatable factual interpretations or questions of statutory construction, must be resolved in favor of taxation. *Id.*

Section 15-65 expressly bars exemption where the property is leased or otherwise “used with a view to profit.” 35 ILCS 200/15-65. Whether real estate is “leased with a view to profit” depends in the first instance on the intent of the owner in using the property. People ex rel. Goodman v. University of Illinois Foundation, 388 Ill. 363, 371 (1944); Victory Christian Church v. Department of Revenue, 264 Ill. App.3d 919, 922 (1<sup>st</sup> Dist. 1988). Thus:

... it is the primary use to which the property is devoted after the leasing which determines whether the tax-exempt status continues. If the primary use is for the production of income, that is, “with a view to profit,” the tax exempt status is destroyed. Conversely, if the primary use is not for the production of income but to serve a tax-exempt purpose, the tax-exempt status of the property continues even though the use may involve an incidental production of income.

Children’s Development Center, Inc. v. Olson, 52 Ill.2d 332, 336 (1972). *See also*, Victory Christian Church, *supra*, at 922.

In order to apply this test, “one must look first to see if the owner of the real estate is entitled to exemption from property taxes.” Victory Christian Church, *supra* at 922. If the owner is so exempt, then “one may proceed to examine the use of the property to see if the tax exempt status continues or is destroyed.” *Id.* Hence, property owned by one or more private individuals does not qualify for exemption even though the owner or owners lease the property to tax exempt entities that use the property for exempt purposes. *Id.*, at 921-923 (real estate owned by a private individual who leased the property to the appellant Church held non-exempt even though the Church used the property for

unspecified religious purposes); Wheaton College v. Department of Revenue, 155 Ill. App.3d 945, 947-948 (2<sup>nd</sup> Dist. 1987) (real estate owned by private individuals who leased the property to the College held non-exempt even though the College used the property for student housing).

There is no dispute that the titled owners of the subject property, Mr. and Mrs. Uhter, do not qualify for exempt status because they are private individuals. However, applicant correctly points that “[r]evenue collection ... is concerned not with the refinements of title but with the realities of ownership.” Southern Illinois University Foundation v. Booker, 98 Ill. App.3d 1062, 1069 (5th District, 1981) (“Booker”); People v. Chicago Title and Trust, 75 Ill.2d 479 (1979); Chicago Patrolmen's Association v. Department of Revenue, 171 Ill.2d 263 (1996). As such, the “owner” of real estate for property tax purposes is not necessarily synonymous with the person or entity that holds legal title to the property. Booker, *supra*; People v. Chicago Title and Trust, *supra*. Rather, the “owner” is the person or entity that in practical terms: (1) exercises rights of control over the property; and, (2) derives benefits therefrom. *Id.*

Factors to be employed in determining “ownership” for property tax purposes include whether the written instrument that creates and governs the respective property interests: (1) makes the purported “owner” liable to pay any property taxes assessed against the property (Wheaton College, *supra*, at 946; Christian Action Ministry v. Department of Local Government Affairs, 74 Ill.2d 51, 61 (1978)); (2) enables that “owner” to receive any tax benefits that the instrument provides (Wheaton College, *supra*, at 948); (3) allows the “owner” to obtain a “substantial monetary interest” in the property by making a sizeable down payment, followed by regular monthly payments,



both of which are applied toward the price at which the “owner” will eventually purchase the property (Christian Action Ministry, *supra*, at 54, 61; Community Mental Health Council v. Department of Revenue, 186 Ill. App.3d 73, 81 (1<sup>st</sup> Dist. 1989)); (4) permits the “owner” to, or prohibits the “owner” from, removing any existing structures on the property or constructing new ones thereon (Wheaton College, *supra*, at 948; Cole Hospital v. Champaign County Board of Review, 113 Ill. App.3d 96, 101 (4th Dist. 1983)); (5) authorizes the “owner” to fully and freely alienate, transfer or (in an appropriate case) sublease the property throughout the term of the instrument (Wheaton College, *supra*, at 948); and, (6) provides that the “owner” will be able to either: (a) purchase the property for no additional consideration at the conclusion of a specified term<sup>3</sup> (Wheaton College, *supra*, at 948); or, (b) have title to the property transferred to the “owner” without further cost upon the occurrence of a specific condition precedent, such as the retirement of a mortgage. Booker, *supra*, at 1066.

In applying these criteria, it is important to remember that although applicant submitted many documents into the record, the only document that vests applicant with any *bona fide* interest in the subject property is the lease admitted as Applicant Ex. No. 3. Therefore, the question of whether applicant, itself, or Mr. and Mrs. Uhter qualify as “owner” of the subject property for present purposes is initially dependent on the terms and conditions set forth in that lease.

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3. Compare Christian Action Ministry, *supra*, where the appellee ministry was held to be the owner for property tax purposes under terms of a contract for deed which provided, *inter alia*, that the ministry would receive title, with no additional consideration required, as soon as it made all installment payments that were due under the contract (*id.* at 54) with Wheaton College, *supra*, where the appellant College was held *not* to be the “owner” for property tax purposes under terms of a 30 year lease that required, *inter alia*, the College would have the right to repurchase the property for \$106,000.00 at the conclusion of the lease term. *Id.* at 948.

One ascertains the legal effect of those terms and conditions by making a fair reading of the lease document as a whole. Forest Preserve District of DuPage County v. Department of Revenue, 266 Ill. App.3d 264, 270 (2<sup>nd</sup> Dist. 1994). Consequently, mere recitals as to the document's purpose are not determinative. *Id.* Rather, it is the cumulative effect of all relevant provisions in establishing which party effectively exercises control over the property and derives benefits therefrom that is decisive. Wheaton College, *supra* at 948.

A fair reading of the lease document as a whole fails to demonstrate by the requisite clear and convincing evidence (People Ex Rel. Nordland v. Home for the Aged, 40 Ill.2d 91 (1968); Gas Research Institute v. Department of Revenue, 154 Ill. App.3d 430 (1st Dist. 1987)) that applicant qualifies as the "owner" of the subject property for present purposes. The lease terms expressly state that applicant cannot sublet, assign, encumber or otherwise alienate its interest in the subject property without first obtaining written consent from the lessors, Mr. and Mrs. Uhter. Consequently, applicant is not truly at liberty to alienate its interest in that property in a full and free manner that is demonstrative of "ownership." Wheaton College, *supra* at 948.

In Wheaton College, *supra*, the court held that the appellant, College, did not qualify as the "owner" for property tax purposes under terms of a 30 year lease which provided, *inter alia*, that the College enjoyed certain incidents of ownership, including the right to remove existing structures from the property and the right to sublease it. Wheaton College, *supra*, at 948. The College did not, however, enjoy the right to freely alienate the property. *Id.*

If a lessee that enjoys full subleasing and removal rights does not qualify as an “owner” for property tax purposes because it is not at liberty to fully alienate the property, then I cannot conclude this applicant-lessee, which enjoys practically no encumbrance or alienation rights, can qualify as such an “owner.”

More importantly, the remaining lease provisions are no different in substance than those contained in most standard commercial leases. For instance, although the lease calls for applicant to pay what initially appears to be the nominal sum of \$1.00 as rental for the premises, it also require applicant to pay as additional rentals, all property taxes, water charges and other levies imposed against the subject property. Thus, the overall economic rental scheme created by the lease is one that violates the statutory prohibition against leases “for profit” because it intends that the private individuals, who lease the subject property to applicant, recoup their operating expenses for that property.

Furthermore, whatever rights of possession that applicant enjoys under the lease are virtually identical to those of any commercial tenant in that applicant can enjoy them only throughout a finite lease term of ten years. To the extent that the lease specifically provides that Mr. and Mrs. Uhter will regain possession of the subject property at the conclusion of this term, applicant, like any other commercial tenant, must surrender possession when the 10-year term ends.

The lease also provides Mr. and Mrs. Uhter with the right, conventionally vested in commercial landlords, to evict applicant from the premises in the event that applicant should default on any of its obligations under the lease. It is, however, noted that the eviction rights created by this particular lease are more stringent than those provided in most commercial leases in that Mr. and Mrs. Uhter can exercise them without giving

prior notice to the applicant. Thus, for all the above reasons, I conclude that Mr. and Mrs. Uhter, are both *de facto* and *de jure* “owners” of the subject property. Accordingly, I further conclude that, pursuant to Victory Christian Church v. Department of Revenue, 264 Ill. App.3d 919, 922 (1<sup>st</sup> Dist. 1988), the subject property does not qualify for exemption from 2000 real estate taxes under 35 ILCS 200/15-65 because it was owned by two private individuals throughout the relevant tax year.

Those private individuals, Mr. and Mrs. Uhter, leased the subject property to applicant pursuant to a grant of authority contained in the “Joint Declaration of Trust” that established the Uhter Trust. The provisions of the Joint Declaration that: (1) create Mr. and Mrs. Uhter as trustees for one and other; and, (2) authorize the trustee to “forthwith” dispose of the subject property and other trust assets “[u]pon the death of the survivor of us” to Mr. and Mrs. Uhter’s sons *per stirpes*, prove that the both the Joint Declaration and the Uhter Trust, itself, are merely estate planning devices that facilitate the orderly distribution of real estate and other trust property from Mr. and Mrs. Uhter to their named heirs.

Applicant has not cited, and my research fails to disclose, the existence of any authority that exempts real estate held under the terms of estate planning devices controlled by private individuals. Indeed, the holding in Victory Christian Church, *supra*, seems to dictate that such devices do not qualify for exempt status precisely because private individuals ultimately retain control over the maintenance and distribution of all of trust assets. However, even if this were not true, the instrument at issue in this case vests two private individuals, who also happen to be Mr. and Mrs. Uhter’s sons, with inheritance rights to all of the trust assets. Accordingly, neither the settlor-trustees nor the

heir-beneficiaries of the Uhter Trust qualify as exempt owners under Victory Christian Church, *supra*. Therefore, the fact that Mr. and Mrs. Uhter have made a business decision to protect the inheritance rights of their heirs by placing certain of their personal assets into a trust does not alter the ultimate conclusion that all of the trust assets, including the subject property, are controlled by private individuals.

As a technical matter, this conclusion renders it unnecessary to determine whether the applicant-lessee qualifies for exempt status. Victory Christian Church, *supra*. However, it does bear noting that applicant's organizational structure is inconsistent with that of an "institution of public charity."

By definition, an "institution of public charity" operates to benefit an indefinite number of people in a manner that persuades them to an educational or religious conviction that benefits their general welfare or otherwise reduce the burdens of government. Crerar v. Williams, 145 Ill. 625 (1893). It also: (1) has no capital stock or shareholders; (2) earns no profits or dividends, but rather, derives its funds mainly from public and private charity and holds such funds in trust for the objects and purposes expressed in its charter; (3) dispenses charity to all who need and apply for it; (4) does not provide gain or profit in a private sense to any person connected with it; and, (5) does not appear to place obstacles of any character in the way of those who need and would avail themselves of the charitable benefits it dispenses. Methodist Old People's Home v. Korzen, 39 Ill.2d 149, 156, 157 (1968).

The first step in determining whether applicant qualifies as an "institution of public charity" is to examine the language of its organizational documents. Morton Temple Association v. Department of Revenue, 158 Ill. App. 3d 794, 796 (3<sup>rd</sup> Dist.

1987). Applicant's Articles of Incorporation provide that the board of directors that governs its daily business affairs shall consist of Mr. Uhter, Mrs. Uhter, their son, David, their foster son, Eugene Miller and one other individual.<sup>4</sup> Applicant Ex. Nos. 1, 2.

This arrangement effectively allows Mr. Uhter and his immediate family to control no less than 4/5, or 80%, of the seats on applicant's governing board. Such an arrangement would normally raise doubts as to whether applicant's governing board is truly free to exercise its business judgment in an independent manner. In this case, however, it appears all but factually impossible for applicant's governing board to exercise such judgment in any manner that is inconsistent with enabling Mr. and Mrs. Uhter to preserve and protect the personal inheritance rights vested in their sons, one of whom also sits on applicant's governing board. Thus, with one possible exception, all of the members of applicant's governing board hold pecuniary and other property interests that are diametrically opposed to, and therefore in conflict with, the type of independent management befitting an "institution of public charity." See, People ex rel. County Collector v. Hopedale Medical Foundation, 46 Ill. 2d 450 (1970).

All doubts as to whether such conflicts enable those who sit on applicant's governing board to derive pecuniary or other profit from applicant's enterprise, in violation of the criteria articulated in Methodist Old People's Home, *supra*, must be resolved in favor of taxation. People Ex Rel. Nordland v. the Association of the Winnebago Home for the Aged, 40 Ill.2d 91 (1968); Gas Research Institute v. Department of Revenue, 154 Ill. App.3d 430 (1st Dist. 1987). Accordingly, I conclude that the subject property does not qualify for exemption from 2000 real estate taxes

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4. The record does not disclose if this individual is related to the Uhter family.

because it is controlled, and therefore “owned,” by private individuals in the first instance and leased to a non-exempt entity in the second.

Applicant seeks to alter the above conclusions by relying on the holding in Cole Hospital v. Champaign County Board of Review, 113 Ill. App.3d 96 (4<sup>th</sup> Dist. 1983). There, the applicant-Hospital’s troubled financial history rendered it unable to obtain State revenue bonds or other forms of conventional financing for construction of a new hospital facility. Cole Hospital, *supra* at 98, 100. Solely for this reason, the Hospital entered into a sale-leaseback arrangement with an independent third party, Safe Care, Inc. *Id.* at 98. The sale-leaseback arrangement provided, in substance, that Safe Care would provide the Hospital with necessary financing, in the amount of \$5.5 million, in exchange for an agreement that would enable Safe Care to acquire the subject property without resort to foreclosure proceedings in the event that the Hospital should default. *Id.* at 98, 100-101.

In analyzing whether this arrangement vested the incidents of ownership in the Hospital or Safe Care, the Cole Hospital court noted that, first and foremost, denying an exemption would, under the facts there presented, effectively penalize an otherwise tax exempt institution, the Hospital, for its failure to obtain conventional financing. *Id.* at 100. The same cannot be said in this case, primarily because all of the property interests at stake herein are held and controlled by non-exempt private individuals. As such, granting a tax exemption in this case would violate public policy by effectively relieving those individuals of their otherwise lawful obligation to pay property taxes.

Furthermore, it is one thing for an inherently complex enterprise, such as that involved in the construction of a modern hospital, to require sophisticated financing

arrangements that are designed for the sole purpose of ameliorating whatever credit risks the enterprise may present. It is quite another for private individuals to create an estate plan by which they and their heirs effectively exercise control over the very same property that they are seeking to exempt from taxation. Therefore, applicant's reliance on the holding in Cole Hospital is misplaced.

In summary, the subject property does not qualify for exemption from 2000 real estate taxes under 35 ILCS 200/15-65 because all of the legal indicia of its ownership, namely the right to control the property and derive benefits therefrom, are vested in private individuals and their heirs. Therefore, the Department's initial determination in this matter should be affirmed.

WHEREFORE, for all the aforementioned reasons, it is my recommendation that real estate identified by Cook County Parcel Index Number 32-13-100-015 not be exempt from 2000 real estate taxes.

Date: 10/24/2003

Alan I. Marcus  
Administrative Law Judge